

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)
) CG Docket No. 02-278
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

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The Direct Marketing Association (“DMA”)¹ submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in which it tentatively concluded that it should eliminate the five-year expiration for numbers placed on the National Do-Not-Call Registry (“Registry”).² However, the Commission proposal has been overtaken by pending legislation, which directs the Federal Trade Commission (“FTC”), the agency that administers the Registry, to make registration permanent and that further requires that agency to take steps to make the Registry more accurate and current. This Commission should therefore work with the FTC to see that the pending legislation—which is expected to be sent to the President in the very near future—is fully implemented. DMA fully supports honoring consumers’ choices to have their telephone numbers on the Registry, and to have their numbers remain on the Registry.

DISCUSSION

I. The Need for Improvements to the Registry’s Accuracy

List Accuracy: With over 145 million numbers now on the Registry, accuracy is more essential than ever. DMA has received reports from its members that many of the numbers on the list are wireless, business, and disconnected numbers. Moreover, there has been some indication that individuals or businesses have been able to place other people’s numbers on the list, and thus raises competitive concerns.

¹ DMA is the largest trade association for businesses interested in direct, database, and interactive marketing and electronic commerce. DMA represents more than 4,000 companies in the United States and 53 other nations. Founded in 1917, its members include direct mailers and direct marketers from 50 different industry segments, as well as the non-profit sector. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 22 FCC Rcd 21237 (2007).

Congressional Mandate: Congress recently passed legislation recognizing the importance of list accuracy. H.R. 3541 and S. 2096, which would make registration on the list permanent, include several important safeguards for the list. They would require the FTC to “periodically check telephone numbers on the national ‘do-not-call’ registry against national or other appropriate databases and shall remove from such registry those numbers that have been disconnected and reassigned.” The bill also allows the FTC to remove “invalid telephone numbers from the registry at any time.” Given the Commission’s expertise in telephone numbering issues, DMA urges the Commission to work with the FTC to implement these important safeguards.

Wireless Calls: DMA’s members have determined that many of the numbers on the Registry are wireless numbers. The Commission’s rules independently prohibit calls to such numbers when the call is made with a predictive dialer, and the Commission has established procedures by which callers can identify and refrain from calling such numbers—including ported numbers—without express consent of the wireless consumer. Thus, cluttering the Registry with wireless numbers merely complicates scrubbing practices and increases the likelihood of error. Therefore, the Commission should work with the FTC to segregate wireless numbers from the Registry.

Accordingly, DMA urges the Commission to work closely with the FTC to ensure that disconnected numbers are promptly removed. It should also work with the FTC to ensure that registered numbers are accurate. Moreover, it should seek ways to have the FTC remove business numbers from the Registry. In addition, the FCC should work with the FTC to segregate the wireless numbers on the list from the landline numbers. The few marketers who manually dial their calls could download the entire list for scrubbing purposes.

II. Other Issues

Finally, DMA notes that the Commission has still not resolved the single most important issue facing those who place telephone calls: preemption. In the 2003 Report and Order creating the Registry, the Commission explained that it believed “any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.”³ The Commission suggested that it would do so on a case-by-case basis.⁴ DMA, other industry groups, and individual businesses filed a number of petitions for declaratory ruling asking that the Commission make clear that the TCPA preempts state laws as applied to interstate calls. The Commission has yet to act on these petitions.

Since then, two state Supreme Courts have held that their state laws trump the TCPA, even as applied to interstate calls.⁵ On the other hand, at least one federal court has held that the TCPA preempts state law.⁶ Callers are left with a complicated framework of conflicting mandates that should not exist under the TCPA’s clear preemptive authority to create a uniform national regulation of calls. The FCC needs to act to resolve this issue.

DMA thus urges the Commission to take up the preemption issue in 2008 and work to create a truly comprehensive and consistent framework for calling across state lines.

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 84 (2003).

⁴ *Id.*

⁵ *Utah Div. of Consumer Prot. v. Flagship Capital*, 125 P.3d 894 (Utah 2005); *State of North Dakota v. FreeEats.com, Inc.*, 712 N.W.2d 828 (2006).

⁶ *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. 2006).

CONCLUSION

DMA fully supports the FCC's effort to allow numbers to remain on the Registry in perpetuity in order to honor consumer privacy choices. At the same time, it is essential for the Commission to work with the FTC to improve the accuracy of the Registry. Finally, DMA urges the Commission to preempt inconsistent state telemarketing laws.

Respectfully submitted,

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